IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

NUMBER 457

HORACE INGRAM, L. E. SMITH,
MARY PARKS LAW AND RUFUS JENKINS,

Petitioners in Certiorari

VS.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Now comes Horace Ingram, L. E. Smith, Mary Parks Law and Rufus Jenkins, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners were indicted by the United States Grand Jury for the Northern District of Georgia, along with other persons (31 defendants) on a three count indict-

ment. Count number 1 charged a conspiracy between the named defendants and other persons to unlawfully, willfully and knowingly attempt to evade and defeat the taxes imposed by Sections 4401 and 4411, Title 26, U.S.C. and to attempt to evade and defeat the payment thereof, (wagering taxes). Count two charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without paying the special tax. Count three charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without registering.

Petitioners and 22 other defendants were placed on trial before a jury, a severance having been granted to three of the defendants, John Elmer Ingram, Charles Harold Echols and Hill Tallent, one of the defendants, Sanchez McDowell, remained a fugitive and another, Clarence Walker, was dismissed from the indictment on motion of the government at the commencement of the trial.

The evidence on behalf of the government centered around a garage located at 1492 Howell Mill Road, in Atlanta, Georgia. On March 27, 1957, a number of federal agents from the Intelligence Division of the Treasury Department, accompanied by investigators from the office of the Solicitor of the Criminal Court of Fulton County, raided this garage, known as Ingram's Garage. Five of the alleged conspirators were present at the time of the raid and a sixth, Rufus Jenkins, came upon the scene later. In the garage the agents found numerous items consisting of scratch pads, paper sacks, card tables, police radios and other items contended by the government to be paraphernalia used in the operation of a lottery.

On September 20, 1956, about six months prior to the raid on Ingram's Garage, petitioner L. E. Smith, defendant Eugene Thomas and petitioner Mary Parks Law were arrested at a residence located in Forsyth County, Georgia, in company with defendants John Elmer Ingram and Charles Harold Echols who were not being tried at this time, and were all charged with the State charge of operating a lottery known as the number game. All those persons later plead guilty to the charge in state court and were fined.

The evidence on behalf of the government further tended to show that Horace Ingram, one of the petitioners, had on several occasions been seen to have given sums of money to police officers of the City of Atlanta who were also indicted and tried as alleged co-conspirators in the case. However, all of the eight police officer defendants who were being tried, J. W. Ellington, Paul Frank Bennett, Gene Paul Hicks, Clyde Edwin Carter, George H. Wade, George W. Slate, Roy H. Flemming and Foster Ellington were all acquitted; seven of them by the jury and the other, J. W. Ellington, by judgment of acquittal by the court at the conclusion of all the evidence in the case.

The evidence on behalf of the government further tended to show that some of the named defendants who were being tried, namely Richard Lee Turner, John Hill, Jr., Will Smith and Tommy Reid were what is known as "pick-up men" in the operation of a lottery. The court, at the conclusion of all the evidence in the case granted judgments of acquittal as to all four of these defendants on substantive counts two and three. Two of these defendants, Tommy Reid and Will Smith, were acquitted by the jury on the remaining conspiracy count.

The evidence for the government showed that John Elmer Ingram, one of the defendants who had been granted a severance and was not then being tried, on or about the month of August, 1956, had accepted some wagers from a witness by the name of Rutherford. However, this witness also testified that he did not know who John Ingram was turning these wagers in to, or who was the actual "banker".

There was further evidence by the government to the effect that petitioner Horace Ingram had, on one occasion, threatened two City of Atlanta police officers, R. M. Clarke and R. T. Appling, by telling them to leave him alone or he would have them moved off his beat and that this petitioner had also made some incriminating admissions to these officers pertaining to being in the lottery business.

At the conclusion of the evidence in chief on behalf of the government, the government moved for a judgment of acquittal as to defendants Hollis, Gresham, Freeman and Williams, and the court granted these motions.

Motions for judgments of acquittal were made on behalf of all the defendants at the conclusion of the evidence for the government and renewed at the close of all the evidence in the case. With the exception of the motions heretofore stated to have been granted, the motions were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction for conspiracy ruled that "None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so." The Court of Appeals further held that "All of them, (appellants),

however, were identified with and active in the carrying on of the numbers game."

"The pick-up men and the headquarters personnel, if neither bankers nor writers, are not liable for the tax and are not required to register." The Court of Appeals then held that "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on August 27, 1958. A Petition for rehearing was denied September 23, 1958. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666, 54 S. Ct. XXXIX).

(b) The statutes of the United States, the validity of which are involved in this application for certiorari, are as follows:

26 U.S.C.A. § 4401. IMPOSITION OF TAX

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an

amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C.A. § 4411. IMPOSITION OF TAX

There shall be imposed a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C.A. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprison-

ed not more than 1 year, or both, together with the cost of prosecution.

18 U.S.C.A. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(c) This petition for certiorari is being filed in this court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2.

The United States Court of Appeals for the Fifth Circuit has misconstrued a decision of this Court involving

a construction of a statute of the United States, and has, by its ruling, permitted the conviction of a lottery pick-up man and other headquarters personnel to stand on a charge of conspiring to evade and defeat the payment of wagering taxes without evidence of their liability for the payment of such occupational and excise taxes or evidence of their knowledge of its evasion by the principal banker.

3.

The United States Court of Appeals for the Fifth Circuit has decided a question of gravity and importance in the administration of federal criminal justice involving federal conspiracy trials as it relates to the conviction of persons for conspiracy where such persons can not be legally held accountable for the substantive offense, alleged to have been the object of the conspiracy.

4.

The United States Court of Appeals for the Fifth Circuit has misconstrued the decision of this Court in the case of *Spies v. United States*, 317 U. S. 492, and that of *United States v. Calamero*, 354 U. S. 351.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that where pick-up men or headquarters personnel employed in the operation of a lottery in violation of state law are exempted by the act of congress from the registrational and taxing provisions of the federal wagering tax act, they can be lawfully convicted in federal court for conspiring with the person liable for the payment of the tax, namely, the banker, to

evade and defeat the payment thereof, a felony, where the evidence implicating such pick-up man or headquarters personnel in the alleged conspiracy showed nothing more than his act of picking up such lottery tickets and his concealment of his acts from State authorities, and fails to show his knowledge that the alleged banker had not paid the tax due the United States Government.

2. The Court of Appeals erred in deciding and ruling that a conviction in federal court can lawfully stand in such a case where the record in the case is silent, and no evidence is offered by the government to prove, that the pick-up man or headquarters personnel had knowledge that the banker had not paid the tax due the government.

3. Since this Court held in *United States v. Calamero*, supra, that the tax and reporting requirements of the Federal Wagering Tax Act did not apply to all employees of gambling enterprises, but only to those persons actually "engaged in receiving wagers" and this indictment in this case was drawn and returned by the grand jury prior to such decision by this court, the Court of Appeals erred in holding in effect that the *felony* conviction of such employee for conspiring to evade and defeat the payment of such tax may stand on the same evidence which would have so authorized and demanded his acquittal on the substantive *misdemeanor* offense of failing to register and pay the tax.

4. Does the ruling of this Court in the case of *Spies v. United States*, 317 U. S. 492, holding evidence of concealment to be sufficient to raise the offense of failure to pay a tax, a misdemeanor, into the felony of evading and defeating the payment thereof, (substantive offenses) apply to a situation so as to hold

a person who is otherwise not liable to the payment of a wagering tax guilty of a conspiracy to evade and defeat the payment thereof on mere evidence that one or more of the parties to such gambling enterprise concealed some of their activities?

5. The Court of Appeals erred in holding and deciding that where certain parties to a gambling enterprise, such as pick-up men and headquarters personnel, are exempted from taxing and reporting requirements of federal law, they can be lawfully convicted of conspiring to violate such law with their principal without evidence of some ingredient in addition to the wagering contract.

6. The United States Court of Appeals for the Fifth Circuit held in this case as follows:

> "It is a federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering."

The Court of Appeals, in so holding and deciding, erred in that there was no evidence in the record to show any such purpose on the part of the petitioners to evade and defeat the federal statutes requiring payment of the tax and registration.

7. The United States Court of Appeals for the Fifth Circuit, in holding and deciding that the evidence in the case was sufficient to show a conspiracy on the part of the

petitioners to evade and defeat the payment of federal taxes inasmuch as the evidence showed appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment, overlooked and misconstrued the controlling principle of the ruling of the Supreme Court in the case of *United States v. Calamero*, 354 U. S. 351, holding as follows:

> "We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering.' The statute was passed, and its constitutionality was upheld, as a revenue measure, United States v. Kahriger, 345 U. S. 22, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

The Court of Appeals overlooked the controlling principle of this case, to-wit: That the appellants, in acting as employees of the banker in the operation of the lottery, were exempt from the taxing and registrational provisions of the Federal Wagering Tax Act, and, the evidence being silent as to knowledge by such employee of the failure of the banker to pay his federal tax, the mere act of the employee in picking up lottery tickets or checking them at a headquarters would not tend to prove the conspiracy to evade and defeat payment.

8. The United States Court of Appeals for the Fifth Circuit erred in applying and extending the principle of law held by this Court in the case of *Spies v. United States*, 317 U. S. 492, in that the holding of this Court in

the Spies case, supra, is completely inapplicable to the facts and the law in the case at bar.

The Spies case, supra, was a prosecution for the *substantive* offense of the felony for the attempt to evade and defeat the payment of federal tax. The real issue before the Court was the distinction between such felony charge and that of the willful failure to pay the tax. In pointing out the distinguishing elements of the greater from the lesser offense this Court held that

> "Willful but passive neglect of the statutory duty may constitute the lesser offense,"

but that in order to raise the lesser offense to the degree of the named felony

> "Congress intended some willful commission *in addition* to the willful omissions that make up the list of misdemeanors." (Italics added.)

This Court then further defined the felony to have been made out by showing the commission of the misdemeanor and to

> "combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The Court of Appeals erroneously misapplied the principle of the Spies case to the facts of the case at bar by holding the concealment to be proof of the conspiracy charge against defendants who otherwise would have violated no federal law, either substantive or conspiratorial, whereas the only legitimate use of the evidence of concealment, according to the Spies case, would have been to have raised a *substantive* misdemeanor to a *substantive* felony. A further fallacy of the holding of the Court of Appeals is that the evidence of concealment in the Spies case was used *in addition to and in aggravation* of the

already made out misdemeanor case, whereas in the case at bar evidence of concealment was used *to make out* a felony conspiracy where no misdemeanor existed prior thereto, either substantive or conspiratorial.

9. The United States Court of Appeals for the Fifth Circuit erroneously broadened and extended the magnitude of conspiracy prosecutions by:

(a) Overlooking the law that the operation of a lottery is not a violation of federal law, and that a conspiracy to operate a lottery is not a violation of federal law, but that in order to fasten federal liability upon one alleged to have been a member of a conspiracy such as that charged in the indictment in the case at bar it would have been necessary that the Government prove such defendant to have entered into an agreement to evade and defeat the payment of the federal tax due; not that they were merely banded together for the purpose of operating a lottery.

(b) Recognizing that acts of concealment of the lottery activities by some of the members of the group charged with the offense to amount to sufficient proof that the entire group have done so for the purpose of one of them (the banker) to evade and defeat the payment of the federal wagering taxes due.

(c) Overlooking the principle of law that proof of concealment by those alleged to have been members of the conspiracy is not, and cannot, be proof of the fact of the unlawful agreement *unless the concealment is alleged and shown by the evidence to have been one of the objects of the conspiracy*, and that the participants *agreed to conceal* their activities in order to further the conspiracy.

(d) Overlooking the law that the gist of conspiracy to evade and defeat the payment of federal tax on wagers is the *agreement to evade the tax;* not the agreement to operate a lottery in violation of the law of the State, and that a conviction for the offense charged is not supported by the evidence where the evidence fails to show by any competent proof that the alleged conspirators, or some of them, *knew* that the person liable for the payment of the tax, the banker, had willfully attempted to evade the payment thereof by some affirmative act or acts.

10. The United States Court of Appeals for the Fifth Circuit overlooked and misconstrued the controlling principle of law enunciated by this Court in the Grunewald case, 353 U. S. 391, to the effect that acts of concealment by the conspirators, where not shown by the evidence to have been one of the objects of the original conspiracy, do not become a part thereof so as to continue the life of the conspiracy, or to give life to one that never did, in fact, really live.

11. The United States Court of Appeals for the Fifth Circuit in effect ruled erroneously that the operation of a lottery in violation of State law was a violation of federal law, so long as the federal tax was not paid, and erroneously ruled that the Government did not have to prove that the federal tax had not been paid. Petitioners respectfully submit that this is an erroneous interpretation of the law, and that just the opposite is true, to-wit: that the operation of a lottery is not a violation of the federal law, but that if one is operated a tax must be paid to the government, and that if such tax is not paid the gist of the offense is the failure to pay the tax; not the operation of the lottery. Consequently, the gist of the of-

fense of conspiracy to violate this same federal law is the *unlawful agreement to evade and defeat the payment of the tax*. In other words, it would not be necessary for the government to prove that all the conspirators were in the lottery enterprise as a prerequisite to a conviction for conspiracy; it would only be necessary for the government to prove that the conspirators agreed to attempt to evade and defeat the payment of the wagering taxes owed by another person who was in the lottery enterprise as a banker or writer.

APPENDIX

Petitioners herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1957

No. 17,012

D. C. Docket No. 21234 Criminal

HORACE INGRAM, FRANK CHRISTIAN, L. E. SMITH, MARY PARKS LAW, RUFUS JENKINS, RICHARD LEE TURNER, ROBERT LEE LEWIS, SR., and JOHN HILL, JR.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Hutcheson, Chief Judge, and Jones and Wisdom, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 27, 1958.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,012

HORACE INGRAM, FRANK CHRISTIAN, L. E. SMITH, MARY PARKS LAW, RUFUS JENKINS, RICHARD LEE TURNER, ROBERT LEE LEWIS, SR., and JOHN HILL, JR.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(August 27, 1958.)

Before HUTCHESON, Chief Judge, and JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: Thirty-one persons were indicted for conspiring to evade and defeat the payment of the wagering taxes imposed by 26 U.S.C.A. §§ 4401 and 4411. Twenty-one of these persons were also charged

with the substantive offenses of accepting wagers without paying the special tax imposed by 26 U.S.C.A. (I.R.C. 1954) § 4411 in violation of 26 U.S.C.A. (I.R.C. 1954) § 7203, and with engaging in the business of accepting wagers without registering as required by 26 U.S.C.A. (I.R.C. 1954) § 4412 in violation of 26 U.S.C.A. (I.R.C. 1954) §7272. Two of the defendants, Horace Ingram and Rufus Jenkins, were convicted on all three counts. These and eight others were convicted on the conspiracy charge. Two of the eight were given probation and the others were sentenced for terms varying from a year and a day to three years. The two defendants who were convicted on three counts were sentenced to five years on the conspiracy charge and one year for failure to pay the tax. They were fined $25.00 for failing to register. The defendants who were sentenced to imprisonment have appealed. Ingram and Jenkins appeal from their conviction and sentence on the substantive charges as well as from their conviction and sentence on the conspiracy count. However, no error is specified and no argument is made as to the convictions on the substantive charges. We will disregard and treat as abandoned the appeal from the convictions on the second and third counts of the indictment. U. S. Ct. App. 5th Cir. Rule 24, Par. 2 (b), 28 U.S.C.A.

The trial lasted nineteen days and the record exceeds thirty-three hundred pages. The evidence connected the appellants with a rather large scale lottery or numbers operation. None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so. The

participants in such an operation have been described by the Supreme Court:

> "A numbers game involves three principal functional types of individuals: (1) the 'banker', who deals in the numbers and against whom the player bets; (2) the 'writer', who, for the banker, does the actual selling of the numbers to the public and who records on triplicate slips the numbers sold to each player and the amount of his wager; and (3) the 'pick-up man', who collects wagering slips from the writer and delivers them to the banker. If there are winnings to be distributed the banker delivers the required amount to the writer, who in turn pays off the successful players." *United States v. Calamaro*, 354 U. S. 351, 77 S. Ct. 1138, 1 L. Ed. 2d 1394.

The appellants, with candor, concede that there is evidence tending to prove that Ingram was a banker. Of the others, the appellants say, "Some of them can be classified as no more than headquarters personnel, some as pick-up men, and as to others the evidence fails to show any particular category." The conviction of Jenkins of the charges contained in the second and third counts of the indictment indicates that he was regarded by the jury as a principal in the enterprise. As to the others, we think the appellants' statement is a fair thumbnail appraisal of the effect of the evidence. All of them, however, were identified with and active in the carrying on of the numbers game.

The pick-up men and the headquarters personnel, if

neither bankers nor writers, are not liable for the tax and are not required to register. *United States v. Calamaro, supra.* The appellants tell us that it is necessary, in the operation of a numbers game, that there be pick-up men and headquarters personnel as well as bankers and writers. These persons violate no Federal law in following their occupations and hence proof of the things done by them in the gambling enterprise, so the appellants urge, is not evidence of a conspiracy to evade and defeat the payment of the wagering tax.

Much of the activity of the group who took part in the operation of the venture occurred in or stemmed from Horace Ingram's Garage in Atlanta, Georgia, referred to by Government counsel as the "money headquarters" or "city headquarters" to distinguish it from the "check-up headquarters" which was out of the city. We shall not undertake to relate the parts played by each of the actors who were engaged in the lottery scheme. It is clear enough that there was a large scale gambling enterprise being conducted and that each of the appellants had a part in it. The operation of a lottery is a criminal offense under the law of Georgia. Ga. Code. §§ 26-6501, 26-6502. There was evidence that each of the appellants had violated the Georgia law. *Lay v. State,* 85 Ga. App. 315, 69 S.E. 2d 583. In addition to the evidence which identified the appellants as being engaged, in one capacity or another, in the lottery project, there was testimony showing that motor vehicles were registered in the names of non-existing or deceased persons at fictitious addresses, that one or more of the vehicles used in the business had been repainted in a different color or colors, that cars had been "souped-up" so as to permit escape or

avoid surveillance, that a truck had been fitted with a secret compartment for the transporting of lottery tickets and other gambling paraphernalia, and that round-about routes were frequently traveled and often changed in carrying on the business of the lottery. That the evidence shows violations of the Georgia law and a concert of effort to escape detection in such violations is tacitly conceded by the appellants; but, they say, there is no evidence of any agreement or concert of action to evade and defeat the payment of the tax owing to the United States. The appellants contend that the convictions cannot stand unless it appears that they knew a tax was payable, that they knew it had not been paid, and that their activity was done with an intent to evade and defeat the payment of it.

It is a Federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering. It was not necessary that the Government prove that the appellants knew of the statute. *Cruz v. United States*, 10th Cir. 1939, 106 F. 2d 828. With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid. Conspirators are held to have intended the consequences of their acts, and by

purposely engaging in a conspiracy which necessarily and directly produces a prohibited result they are, in contemplation of law, chargeable with intending that result. *United States v. Patten*, 226 U. S. 525, 33 S. Ct. 141, 57 L. Ed. 333, 44 L.R.A. N.S. 325. "The conspiracy is the crime and that is one, however diverse its objects." *Frohwerk v. United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; *United States v. Manton*, 2nd Cir. 1938, 107 F. 2d 834; cert. den., 309 U. S. 664, 60 S. Ct. 590, 84 L. Ed. 1012.

The question as to whether the conspiracy was for the purpose of evading and defeating the requirements of the Federal law was for the jury and the jury's verdict has resolved the question. It is immaterial whether there was another purpose or purposes and whether such other purposes were legal or illegal. *Spies v. United States*, 317 U. S. 492, 63 L. Ed. 364, 87 L.Ed. 418; *Kobey v. United States*, 9th Cir. 1953, 208 F. 2d 583.

One other question remains for disposition. The appellants state it in these words:

> "The gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. In order to fasten liability upon any person for this tax a wagering agreement must first be entered into between a bettor and a banker. The Act, therefore, necessarily contemplates more than one person be involved. However, Congress has seen fit to impose no tax liability upon any person in this enterprise other than the banker and a writer employed by him. The bettor or player, the pickup man and the other

various and sundry employees of the banker or writer are all exempted, by the Act of Congress, from paying tax. In such cases as these, there can be no conviction for a conspiracy merely to enter into such an agreement unless there is also an ingredient in addition to the wagering contract, for the mere doing of the substantive act in such case must stand or fall on whether the law imposes a penalty for such substantive act. In other words a conspiracy case can not be made out against one who could receive no penalty for the substantive offense, unless an additional ingredient is also present."

In support of their contention the appellants rely upon the rule that an agreement between buyer and seller, without more, does not establish a conspiracy for an illegal sale of liquor. *United States v. Katz*, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986. A like analogy is drawn from the holding that a woman could not be convicted of conspiring to violate the Mann Act when she was the person to be transported with her consent across a state line unless some other ingredient was present. *Gebardi v. United States*, 287 U. S. 112, 53 S. Ct. 35, 77 L. Ed. 206, 84 A.L.R. 370. If this were a case where one who had purchased a lottery ticket was contending that he could not be convicted of being a conspirator the argument might be persuasive. It is not such a case. The charge is not that of carrying on a lottery. It is of a conspiracy to evade and defeat the payment of the wagering tax. The proof was sufficient.

Since we fail to find merit in the appeal, the judgment of the district court is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By: GILBERT F. GANUCHEAN

Deputy

New Orleans, Louisiana

(SEAL)